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Supreme Court, U.S.
FILED
DEC 15 1997
CLERK

No. 97-652

In the Supreme Court of the United States

OCTOBER TERM, 1997

LAWRENCE MARKS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners have a compensable interest under the Fifth Amendment's Taking Clause in property that lies below the mean high water level (MHWL) and falls within the navigational servitude of the United States.

2. Whether the government's actions to stop petitioners' fill activities of property situated below the MHWL resulted in a taking of their property above the MHWL.

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OPINIONS BELOW

The opinion of the Court of Federal Claims (Pet. App. 1a-53a) is reported at 34 Fed. Cl. 387. The court of appeals' judgment of affirmance (Pet. App. 54a-55a) is unpublished, but the decision is noted at 116 F.3d 1496 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1997. A petition for rehearing was denied on July 16, 1997. Pet. App. 56a-58a. The petition for a writ of certiorari was filed on October 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns two parcels of land in Key West, Florida, which petitioners acquired in 1972 and 1980 with the intention of developing them for condominiums.[1] The property contains a low-lying salt marsh area that is subject to tidal fluctuations; some of the property lies above the mean high water level (MHWL) and some below the MHWL. Pet. App. 2a-3a, 61a-62a. Petitioners' attempts to develop the property by filling and dredging the areas below the MHWL have resulted in a long-running series of different lawsuits, of which this is the most recent.

1. In 1972, petitioners began to fill areas of the property below the MHWL and planned to dredge other areas to create a marina. Pet. App. 4a. In January 1973, the Army Corps of Engineers (Corps) ordered petitioners to cease and desist their fill operations below the MHWL, informing petitioners that a federal permit was required under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403. Pet. App. 5a-6a. The Corps further ordered petitioners to remove all fill placed below the MHWL. *Id.* at 6a. Although petitioners and the Corps initially disagreed over where the MHWL fell, the two sides eventually agreed upon a compromise MHWL. *Id.* at 7a.[2]

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[1] The parcels are denominated Parcel 38 and Parcel 34. Parcel 38 is a 52-acre parcel that abuts the Riviera Canal, a man-made channel that connects to the Atlantic Ocean. Parcel 34 is a small strip of land that connects Parcel 38 to Roosevelt Boulevard, a major thoroughfare in Key West. Pet. App. 2a-3a.

[2] In addition to the cease and desist order, the United States brought a criminal information against petitioner Island in the Sun Condominiums, Inc., charging it with the unauthorized filling of one of the parcels of land. Petitioner Island in the

Rather than remove the fill as ordered by the Corps, petitioners attempted to obtain an after-the-fact permit to allow the fill below the MHWL to stay in place and to permit dredging. Pet. App. 7a. In order to receive such a permit from the Corps, petitioners were required to obtain a state water quality certification pursuant to the Clean Water Act, 33 U.S.C. 1341. On April 2, 1974, however, the State of Florida denied the necessary certification. Pet. App. 7a. As a result, the Corps denied petitioners' permit application and again directed petitioners to remove all fill placed below the MHWL. *Id.* at 7a-8a. Florida's administrative denial of the water quality certification was affirmed in the state courts. *Island-in-the-Sun Condominium of Key West, Florida, Inc.* v. *Governor & Cabinet of Florida*, 345 So. 2d 831 (Dist. Ct. App.), cert. denied, 352 So. 2d 172 (Fla. 1977).

After petitioners refused to comply with additional orders by the Corps to remove the fill below the compromise MHWL, the Corps brought an enforcement action in the United States District Court for the Southern District of Florida in October 1980, seeking a permanent injunction requiring petitioners to remove the fill they had placed below the MHWL in 1973. Pet. App. 8a. Petitioners counterclaimed, requesting compensation for an alleged taking. *Id.* at 9a. The district court rejected the takings counterclaim on jurisdictional grounds and, on January 15, 1982, ruled that petitioners could continue to develop the property above the compromise MHWL if they removed enough of the fill below the MHWL to allow tidal fluctuations and the free flow of aquatic

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Sun pleaded nolo contendere and paid a $500 fine. Pet. App. 7a.

organisms. *Id.* at 9a-10a; see *id.* at 59a-94a (district court opinion). That decision was affirmed by the Eleventh Circuit. *United States* v. *Context-Marks Corp.*, 729 F.2d 1294 (1984) (Pet. App. 95a-101a).

Petitioners thereafter acquired Parcel 34, the property adjacent to Parcel 38. In 1986, they commenced filling activity on Parcel 34. The Corps responded to that activity by issuing another cease and desist order. Pet. App. 10a-11a. Petitioners then sought an order from the district court to enforce the portion of the January 15, 1982 order that allowed them to continue to develop the property. *Id.* at 11a. The district court ruled that it lacked jurisdiction because the 1982 case involved a different part of the property. *Ibid.*

On November 4, 1988, petitioners filed an action in the United States District Court for the Southern District of Florida, in which they sought declaratory and injunctive relief regarding the legality of the government's regulation of their development activities. Pet. App. 11a. All of petitioners' claims, including a takings claim, were dismissed by petitioners voluntarily or by order of the district court. *Id.* at 12a & n.6.

2. On September 18, 1989, petitioners filed the present action in the United States Court of Federal Claims, claiming that the Corps' actions with regard to petitioners' fill activities constituted a temporary regulatory taking. Pet. App. 12a-13a. On November 6, 1995, the court granted the United States' motion for summary judgment. *Id.* at 1a-53a.

The court held that petitioners could not assert a takings claim for property below the MHWL because such property lies within the navigational servitude of the United States, over which the authority of

the government is supreme. Pet. App. 31a-33a (citing *United States* v. *Rands*, 389 U.S. 121, 123 (1967)). Applying this Court's decisions (see *id.* at 42a-43a), the court also rejected petitioners' claim of a temporary regulatory taking of their property above the MHWL. The court first examined the "validity of the government actions" and found "sufficient evidence in the instant case to demonstrate that there was a legitimate state interest in preserving the quality of water within the area of [petitioners'] land." *Id.* at 50a. Second, the court found that petitioners had failed to show that the governmental action had left the land "devoid of all economic viability." *Id.* at 51a. Although petitioners did not develop the land during their disagreement with the Corps, petitioner Lawrence Marks admitted that such development did not proceed due to a lack of money and the economic recession in the area. *Ibid.* The trial court further noted that the economic viability of the property was demonstrated by the fact that, during the alleged temporary taking, petitioners profited from the sale of parts of the land for "millions of dollars." *Ibid.* Third, the court found that the Corps' actions did not interfere with petitioners' reasonable investment-backed expectations. *Id.* at 51a-52a. As to that factor, the court rejected petitioners' argument that they purchased the property in reliance on the government's purported lack of enforcement of its regulations. In the court's view, the existence of the Rivers and Harbors Appropriation Act should have alerted plaintiffs to the possibility of enforcement. *Id.* at 52a.

On May 15, 1997, the Court of Appeals for the Federal Circuit issued a per curiam order affirming the judgment of the Court of Federal Claims. Pet. App. 54a-55a.

ARGUMENT

Petitioners claim that the government's regulation of their fill activities resulted in a temporary regulatory taking of their property both below and above the mean high water level (MHWL). Neither claim finds support in this Court's precedents, and the decision below does not conflict with any decision of any other court. Further review, therefore, is not warranted.

1. It has long been established that property below the navigable waters of the United States is subject to the "dominant servitude" of the federal government to regulate such property in the interest of navigation: "The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *United States* v. *Rands*, 389 U.S. 121, 123 (1967). See also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028-1029 (1992) ("a permanent easement that was a pre-existing limitation upon the landowner's title," such as the United States' navigational servitude, inheres in a landowner's title); *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 705-706 (1987) (rejecting claim that United States owed just compensation for dredging damage to land beneath navigable waters owned in fee simple by tribe); Pet. App. 31a-32a (collecting cases). Thus, under this Court's cases, the Fifth Amendment's Just Compensation Clause does not require the payment of compensation to the owner of land that lies below the MHWL when regulatory action is taken pursuant to

the United States' exercise of its right to control the navigable waters.

Petitioners acknowledge (Pet. 13) the "absolute language in many of [this Court's] prior decisions," but nonetheless contend that the lower courts' rulings in this case conflict with this Court's decision in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). That assertion is incorrect. *Kaiser* held that the navigational servitude did not insulate the government from a takings claim when a private landowner had linked private, non-navigable waters with the navigable waters of the United States, and the government later maintained that the public had a right to freely use the formerly private area. *Kaiser*, however, is inapposite to petitioners' case. In contrast to the property at issue in *Kaiser*, petitioners' property below the MHWL has always been part of the navigable waters and thus subject to the federal government's dominant servitude. Moreover, in *Kaiser*, the government sought to infringe on the property owners' right to exclude others, whereas here the Corps merely regulates petitioners' development activities. *Id.* at 179-180. *Kaiser* held that such regulation does not require just compensation. See *id.* at 179 ("We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, * * * [but] we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.") (footnote omitted).

Petitioners read *Kaiser* (Pet. 13) as standing for the proposition that the government must pay compensation when it regulates the navigable waters for

a non-navigation purpose, such as the preservation of environmental resources. *Kaiser*, however, expressly rejects that argument. See 444 U.S. at 173 ("[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. In truth the authority of the United States is the regulation of commerce on its waters.") (quoting *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940) (ellipsis omitted)). Moreover, even if that argument had not been expressly rejected by *Kaiser*, it would have no bearing on this case, because the Corps has consistently justified stopping petitioners' fill activities due to the potential for interference with navigation. See Pet. App. 6a (invoking the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403, not the Clean Water Act, as the basis for Corps' cease and desist orders).

2. Petitioners contend (Pet. 15-24) that the courts below erred in rejecting their claim that the actions by the Corps in opposition to petitioners' fill activities resulted in a temporary regulatory taking of their property above the MHWL. That fact-bound ruling properly applied this Court's standards governing claims of temporary regulatory takings.

This Court has stated that, in determining whether government regulation results in a Fifth Amendment taking, courts engage "in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495 (1987) (quoting *Kaiser*, 444 U.S. at 175). See also *Penn*

Central Transportation Co. v. *New York City*, 438 U.S. 104, 124 (1978). In this case, the trial court examined precisely the three factors identified by this Court in *Keystone Bituminous Coal* and *Penn Central*. See Pet. App. 42a-53a. Petitioners do not dispute that those factors establish the appropriate legal test, but rather disagree with how the court applied those factors to the facts of this case. That fact-bound application of settled law does not warrant this Court's review.

In any event, the trial court properly applied the factors identified by this Court. First, in analyzing the character of the governmental action, the court found that, while the government's regulation of petitioners' activities below the MHWL was a hindrance to the development of the property above the MHWL, it did not go so far as to amount to a taking of that property. Pet. App. 45a-48a. Second, the court found that the governmental action did not leave the property devoid of all economically viable uses because (a) the Corps' cease and desist orders did not preclude petitioners from developing the property above the MHWL; (b) petitioners admitted that they did not develop the property due to the economic recession and a lack of funding; and (c) petitioners sold a portion of the property above the MHWL at a profit. *Id.* at 51a. Third, the court found that the government's actions did not interfere with petitioners' reasonable investment-backed expectations because the existence of regulatory authority under the Rivers and Harbors Appropriation Act was known to petitioners when they purchased the property. Petitioners thus could not show that they had bought the property in reliance on a reasonable expectation

that the government would never exercise its regulatory authority. *Id.* at 51a-52a.

Petitioners primarily challenge (Pet. 15-21) the trial court's reliance on the profit they made in selling the property, but fail to acknowledge that that profit was only one of several facts that led the court to conclude that the government had not entirely deprived the property of all economically viable uses. Thus, even if reliance on that fact was in error, it would not entitle petitioners to any relief, as the remaining facts fully justify the court's decision. In any event, the court's reliance on the profit petitioners made by selling a portion of the property was indeed relevant in showing that the property had economically viable uses, as the sale occurred during the period when petitioners allege that the government's regulation caused a temporary taking. See Gov't C.A. Br. 30-31.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1997